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Issue date: 19Jul2001

CASE NO.: 1996-LHC-0028, BRB NO. 00-0343

OWCP NO.: 07-0137414

In the Matter of:

DOUGLAS J. PASCUAL, JR.
Claimant

v.

FIRST MARINE CONTRACTORS, INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOC.,
Carrier

BEFORE: JUDGE JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS

Came on this date to be considered this case, in accordance with the Decision and Order of the Benefits Review Board (hereinafter the "BRB" or "the Board") issued December 13, 2000, remanding this case for the second time to the Office of Administrative Law Judges. The BRB remanded this case for reconsideration of the nature and extent of Claimant's disability due to the work injury under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (hereinafter "the Act") and to review all relevant evidence of record.

In Pascual v. First Marine Contractors, Inc., BRB No. 97-1283 (June 17, 1998)(unpublished), the BRB vacated this Court's findings that Claimant's neck and back injuries were not work-related and its conclusion that Claimant had no ongoing disability. In the decision on remand, this Court found that Claimant's neck and back injuries were work-related, and that Claimant was entitled to reasonable and necessary medical expenses related to the work injury. See Pascual v. First Marine

Contractors, Inc., 1996-LHC-00028 (November 3, 1999, ALJ Kerr)(unpublished). After finding that Claimant established his prima facie case of total disability, this Court found that Respondent did not establish the availability of suitable alternative employment. This Court also determined that Claimant had not reached maximum medical improvement, and that his average weekly wage was $360. The Court ordered Respondent to pay temporary total disability payments to Claimant from August 16, 1995 and continuing, as well as medical benefits. Respondent appealed this Court's decision to the Board.

In Pascual v. First Marine Contractors and Signal Mutual Indemnity Assoc., BRB No. 00-0343, (Dec. 13, 2000) (unpublished) , the BRB vacated this Court's finding that Claimant established his prima facie case of total disability based solely on Drs. Correa and O'Keefe's opinions. Additionally, the BRB vacated this Court's finding that Respondent did not establish suitable alternative employment as of November 6, 1996, the date of the formal hearing. The BRB also held that this Court must determine Claimant's post-injury wage-earning capacity if Respondent did establish suitable alternative employment. This Court's findings were upheld in all other respects. Therefore, the issues that are before this Court on the second remand are the extent of Claimant's disability and loss of wage earning capacity. Claimant and Respondent both filed briefs addressing these issues, which have been considered prior to the rendering of this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment."33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington

Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

A judge must make a specific factual finding regarding maximum medical improvement and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). This Court previously found that Claimant had not reached maximum medical improvement, a finding that was affirmed by the Board. Therefore, Claimant's disability is temporary in nature.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work-related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

In the present case, Claimant presented credible, medical evidence from several physicians that he has been unable to return to his usual employment from the date of the accident, August 16, 1995 and continuing. Drs. O'Keefe and Correa, who saw Claimant close to the time of the injury, both opined that Claimant could not return to a heavy manual labor job, his usual employment. *See* CX-1; TR 121-122. Dr. O'Keefe opined that Claimant was temporarily totally disabled from any employment on August 23, 1995. *See* TR. 121-122. Dr. Correa, a board-certified neurosurgeon, concluded that Claimant was unable to return to full, unrestricted work on September 19, 1995. *See* CX-1. Dr. Watermeier, Claimant's orthopedist, examined Claimant on several occasions in 1995 and 1996. *See* TR. 123-136. He concluded that Claimant was temporarily and totally disabled from performing heavy, manual labor on both September 25, 1995 and July 24, 1996, and that Claimant's condition had not improved in the interim. *See* TR. 136. As a result, Dr. Watermeier restricted Claimant from repetitive bending, stooping, lifting over thirty (30) to forty (40) pounds, with no

prolonged or frequent standing or sitting. *See* TR. 136.[1] Dr. Laborde, an orthopedic surgeon,

reached an opposite conclusion regarding Claimant's disability. Dr. Laborde examined Claimant on October 22, 1996, a few months after Dr. Watermeier's examination. *See* TR. 153. However, he opined that Claimant did not need any medical restrictions from working. *See* TR. 153.

After examining all of the medical evidence, this Court concludes that Claimant has sufficiently proven total disability from the date of the accident and continuing. Both Drs. Correa and O'Keefe opined that he was totally disabled in the period following the accident in 1995. Therefore, Claimant has sufficiently proven total disability from August, 1995 to July, 1996, the date of Dr. Watermeier's examination. On that date, Dr. Watermeier noted that Claimant's condition had not improved during his examinations in 1996. As a result, he declared Claimant totally disabled and restricted him from heavy, manual labor, which was Claimant's usual type of employment. Although this Court notes that Dr. Laborde reached an opposite conclusion regarding Claimant's disability, this Court places determinative weight on Dr. Watermeier's medical opinion regarding the extent of Claimant's disability from 1996 and continuing. While both physicians are equally qualified to examine Claimant, this Court finds that Dr. Watermeier examined Claimant on several occasions and was therefore better able to accurately assess the extent of Claimant's neck and back injuries. Dr. Laborde only examined Claimant one time. The opportunity to examine these injuries is significant given that Claimant exhibited deterioration in both the cervical and lumbar regions following the August, 1995 accident. Although Dr. Laborde opined that Claimant should have no medical restrictions from working, he conceded that Claimant did exhibit a worsening disc bulge along with a pre-existing prior compression fracture. Both Drs. Watermeier and Laborde examined Claimant within a few months span in 1996. Given that there was medical evidence of a degenerative injury on both occasions, this Court finds that Dr. Watermeier's opinion regarding the extent of Claimant's disability is both the most logical and best supported by the medical evidence.

On the basis of the medical evidence provided through Drs. O'Keefe, Correa, and Watermeier, this Court finds that Claimant has established that he was not able to return to his regular employment or similar employment due to his physical injuries. Therefore Claimant has sufficiently proven a complete loss of wage earning capacity and established a prima facie case for total disability from the accident date, August 16, 1995, and continuing.

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[1]This Court notes that there is additional evidence in the record from Dr. Murphy, orthopedic surgeon, indicating that Claimant was already on work restrictions for a pre-existing injury. However, there is evidence in the record to indicate that he was not working within those restrictions at the time of the 1995 accident. Dr. Murphy opined that he placed Claimant on work restrictions prior to the 1995 accident in order to avoid aggravating Claimant's condition. *See* TR. 178-182.

Total disability, and loss of wage earning capacity, become partial on the earliest date that the employer establishes suitable alternative employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and an opportunity that he could secure if he diligently tried. See New Orleans

Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); See McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Respondent presented Judith Lide, an expert in the field of vocational rehabilitation, to testify as to suitable alternative employment for Claimant. This Court finds Ms. Lide's testimony credible and accurate regarding both suitability and availability of the jobs she found for Claimant. Ms. Lide initially conducted a thorough evaluation of Claimant in order to determine his medical restrictions, both before and after the accident, his educational background, and transferrable skills. *See* TR. 190. She listed Claimant's physical restrictions for employment prior to the 1995 accident as occasional lifting of thirty-five (35) pounds, frequently lifting fifteen (15) pounds, and occasionally lifting seven (7) pounds. *See Id.* at 190-191. He was classified to do light to medium work prior to the accident. *See Id.* at 191. This Court notes that since it placed determinative weight as to Claimant's post-accident condition on Dr. Watermeier's medical conclusions, the suitability of Ms. Lide's listed positions will be determined in light of his medical restrictions. Dr. Watermeier restricted Claimant from repetitive bending, stooping, lifting over thirty (30) to forty (40) pounds with no prolonged or frequent standing or sitting. *See* TR. 136.

Ms. Lide outlined several positions that would fit within these work restrictions. Although the employers for the driver positions, Hyatt, the print shop, and Seltzer Dental Lab, prefer either a high school diploma or a GED, none of the employers require it. *See Id.* at 196-198. Additionally, none of these positions, except the shuttle driver for the Hyatt, require Claimant to exceed his lifting restrictions. This Court finds that the Hyatt driver position would require Claimant to engage in repetitive lifting and stooping, because it requires the driver to load luggage. *See Id*. at 198-199. Therefore, this position would exceed Claimant's work restrictions and be unsuitable for him. Ms. Lide also testified that both the print shop and Seltzer Dental positions allow the drivers to alternate positions throughout the day and only require minimal lifting. *See Id.* at 196-198. Therefore, these positions would be suitable. Ms. Lide testified that these positions paid $5.00 to $5.50 per hour. *See Id.* at 195-198. One position was currently available and the other would have an opening at the
beginning of the month. *See Id.* at 195-198. The testimony given regarding the truck driver position indicates that the position would be at the higher end of Claimant's lifting restrictions. However, based on

the medical evidence, it would still be suitable for him. Ms. Lide testified that the position had opened up on November 5, 1996, and was available at the time of the hearing on November 6, 1996. *See Id.* at 198-199. This position would pay $7.00 per hour. *See Id.* at 199. Given this uncontradicted testimony, this Court finds that Respondent established both suitability and availability of the abovementioned jobs at the time of the hearing.

Additionally, the toll collector position would fit within Claimant's work restrictions, as it allows the employee to alternate positions during the day. That position pays $7.15 per hour, and was available on November 4, 1996, two days prior to the date of hearing. *See Id.* at 198. Both the assembler and service advisor positions, although requiring more lifting, also allow Claimant to work within his physical restrictions. The assembler position requires lifting a maximum of twenty (20) pounds with occasional ten (10) pound lifting, and the wages are $4.75 per hour. *See Id.* at 198-199. The service advisor job requires standing, however, Ms. Lide testified that the employee would be able to walk around. Claimant would only be required to do minimal lifting with wages ranging from $6.00 to $7.00 per hour. *See Id.* at 199. Ms. Lide also testified that both positions were accepting applications as of the date of the hearing. Given her testimony, this Court finds that both positions were sufficiently available for establishing suitable alternative employment.

Since Respondent has provided sufficient evidence of a realistically available job opportunities within Claimant's work restrictions, Respondent has established suitable alternative employment as of the date of the formal hearing, November 6, 1996. These positions ranged in hourly wages from $4.75 to $7.15 per hour. Therefore, an average of the suitable and available positions yields a wage earning capacity of $5.95 per hour. For a forty-hour work week, this would equal $238.00 per week. Since this Court previously found that Claimant's pre-accident average weekly wage is $360.00 per week, Claimant became partially disabled on November 6, 1996, and continuing, with only a partial loss of wage earning capacity. Thus, Claimant's disability compensation from his pre-accident average weekly wage will be diminished accordingly. Claimant sustained a total loss of wage earning capacity and is therefore entitled to total disability benefits from the date of the accident, August 16, 1995 to November 5, 1996. After that date, the extent of Claimant's disability and loss of wage earning capacity became partial due to the availability of suitable alternative employment.[2]

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[2]Pursuant to the BRB's decision, this Court finds that since Respondent did not establish suitable alternative employment for the periods of Claimant's incarceration, Claimant is entitled to total disability benefits from October 25, 1995 through February 12, 1996 and September 19-20, 1996. See Pascual v. First Marine Contractors, Inc., BRB No. 00-0343 (Dec. 13, 2000)(unpublished).

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from August 16, 1995 until November 5, 1996, based on an average weekly wage of $360.00;

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from November 6, 1996 and continuing, subject to the limitations of section 8(e), based on an average weekly wage of $360.00, minus the suitable, alternative employment wages of $238.00 per week;

(3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(4) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from Claimant's work-related accident on August 16, 1995. See 33 U.S.C. §907.

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this 19th day of July, 2001, at Metairie, Louisiana.

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JAMES W. KERR, JR.
Administrative Law Judge

JWK/sls